United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-4225

To be argued by
STANLEY H. WALLENSTEIN

In The

United States Court of Appeals

For The Second Circuit

September Term, 1975

RAFAEL ALBERTO FERRARO, and MARIA LUISA FERRARO,

Petitioners,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the Board of Immigration Appeals

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Statement of the Issue

Whether the Board of Immigration Appeals erred in failing to determine whether the petitioners, by virtue of their defective reentry, had forfeited their lawful permanent resident status, or still maintained that status.

Statement of the Case

This is a petition for review of a final order of deportation entered by the Board of Immigration Appeals

on June 12, 1975. In that order the Board affirmed the decision of an Immigration Judge finding the petitioners deportable for having made an entry into the United States without inspection, and ordering the grant of voluntary departure in lieu of deportation.

Although the Immigration Judge found the petitioners deportable because of their defective entry, he expressed doubt as to whether they had thereby irrevocably forfeited the lawful permanent resident status which they had enjoyed for some years. Without definitively deciding that issue, apparently because of uncertainty as to the law, but citing two earlier Board decisions in petitioners' favor, he suggested that the petitioners be permitted to leave the country and return after being properly inspected upon which they would resume their lawful permanent resident status. The Board, in its terse, two-paragraph opinion, completely overlooked or avoided that issue and entered an order simply affirming the Immigration Judge's order and dismissing the appeal.

On this petition for review, the petitioners contend that the Board failed to completely dispose of their case by neglecting to consider and determine the issue of whether they have irrevocably forfeited their permanent resident status.

This Court has subject matter jurisdiction over this petition for review pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a(a).

Statement of the Facts

The petitioners, Rafael and Maria Ferraro, husband and wife, are both aliens, natives and citizens of Argentina. They were lawfully admitted to the United States as permanent resident aliens on June 20, 1969 and April 9, 1971, respectively (T.19,20).[1/] They have resided in this country since their respective admissions and they have two infant United States citizen children.

On May 25, 1973, the Ferraros with their infant son went by car to Toronto, Canada for the Memorial Day weekend to visit relatives living in Toronto and to meet some relatives visiting Toronto from Argentina (T.5,p.6). They returned to the United States in the early morning hours of May 28th. They were accompanied by the relatives from Argentina, a family of two adults and two children. The

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1/ References preceded by "T" refer to the tabs affixed to the Certified Administrative Record filed by the Government. References preceded by "A" refer to the pages of petitioners' appendix.

Ferraros had their alien registration cards with them and would have been admitted simply by exhibiting them at the border (T.5,p.42). The relatives from Argentina, however, had no authority to enter the country (T.5,p.43), but Ferraro had mistakenly believed that he had made arrangements permitting their lawful admission (T.5,p.45).

The Ferraros crossed the border that night at the Churubusco port of entry (T.5,p.53). The inspection station, however, was unmanned at the time (T.5,p.39). They continued on and in a few moments stopped at a gas station at which point they knew they were in the United States (T.5,p.41). When they left the gas station they turned onto the road towards New York rather than back to the Canadian border to find an open inspection station (T.5,p.46). At that point they were taken into custody by border patrol agents (T.7,p.71), and deportation proceedings were subsequently commenced against them on a charge of entering without inspection (T.13,14).

After holding hearings which consisted primarily of the testimony and cross examination of the Ferraros (T.5-7), Immigration Judge Ira Fieldsteel, on October 7, 1974, entered his decision and order (A.1-13). Judge Fieldsteel found that the Ferraros had effected an entry into the United States without inspection when they left the gas station

and turned toward New York rather than the Canadian border (A.9). Thus he concluded that the Ferraros, because of their defective entry were deportable under Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2). In lieu of deportation, he granted them the only discretionary relief he believed to be available, that being voluntary departure (A.11,13).

In the course of his decision Judge Fieldsteel made reference to two earlier decisions of the Board of Immigration Appeals in cases factually similar to the case before him, both involving entry without inspection across a land border by a lawful permanent resident.[2/] In both cases, the Board, while sustaining the charge of deportability because of the defective entry, remanded the matter to permit the alien to obtain his alien registration card so that he could leave the country under the voluntary departure order and apply for readmission at a port of entry as a returning resident. Judge Fieldsteel noted that these cases apparently reflected "the opinion of the Board of Immigration Appeals, that under circumstances similar to the instant case, the respondents by entering the United States without inspection, did not abandon or forfeit their status as persons entitled to return to an unrelinquished

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2/ The decisions, Matter of Romero-Uranga and Matter of Gutierrez-Lavin are reproduced in petitioners' appendix at A.14-21.

domicile in the United States"(A.12).

Despite this apparent rule of law, Judge Fieldsteel made no definitive finding or order concerning the Ferraros' permanent resident status. He did appear to suggest that the Ferraros be permitted to depart from the United States with their alien registration cards so they could "return properly and subject themselves to inspection"(A.13). He felt, however, that because the alien registration cards were in the possession of the Immigration and Naturalization Service ("INS"), that return of the cards to permit the Ferraros to effect a proper entry, was up to the discretion of the INS (A.12).

Following Judge Fieldsteel's order, counsel for the Ferraros filed notice of appeal to the Board (T.2), and by letter dated December 31, 1974, requested the INS District Director to return the alien registration cards so that the Ferraros could leave and reenter with inspection in line with Judge Fieldsteel's decision (A.22,23). The District Director responded by letter dated January 15, 1975 declining to return the cards, stating that "the suggestion is not an acceptable interpretation of the position of the Board of Immigration Appeals" and adding "we are hopeful of clarification"(A.24).

The clarification hoped for by the District Director never came, for on June 12, 1975, the Board of Immigration Appeals affirmed Judge Fieldsteel's order and dismissed the appeal. In its decision (A.25), the Board made no reference to the Ferraros lawful permanent resident status and the effect of the defective entry, if any, on that status. And the Board made no reference at all to the two decisions cited to it by Judge Fieldsteel, neither saying that they correctly represented the law, or otherwise.

This petition for review followed.

Relevant Statute

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 101, 8 U.S.C. § 1101:

(a) As used in this Act --

* * * * *

(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

Relevant Regulation

Title 8, Code of Federal Regulations:

§ 3.1 Board of Immigration Appeals

* * * * *

(d) Powers of the Board

(1) Generally. Subject to any specific limitation prescribed by this chapter, in considering and determining cases before it as provided in this part the Board shall exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case.

ARGUMENT

THE BOARD OF IMMIGRATION APPEALS ERRED IN FAILING TO DETERMINE WHETHER THE FERRAROS HAD FORFEITED THEIR LAWFUL PERMANENT RESIDENT STATUS BY VIRTUE OF THEIR DEFECTIVE REENTRY, OR WHETHER THEY STILL MAINTAIN THAT STATUS.

It is readily apparent that in this case there was an issue before the administrative agency which the agency left unanswered. That issue is whether the Ferraros lost their lawful permanent resident alien status because of their defective reentry, or whether, even though deportable, they still maintain that status. The issue is important because if they still maintain that status they need only leave the country under the voluntary departure order and return with proper inspection in which event this case would be moot. It is important too because the consequences of deportation have long been recognized as grave, Tan v. Phelan, 333 U.S. 6,10(1948), and this is particularly true here where the subjects have lived in this country lawfully for several years and have raised a family here.

The issue comes into focus because the Board in two earlier cases reached results indicating that aliens similarly situated to the Ferraros had not forfeited their lawful permanent resident status. In

Matter of Romero-Uranga,[3] the alien sought reentry after a brief trip to Mexico. The inspecting immigration officer denied him admission because he was intoxicated, retained his alien registration card and instructed him to return several days later. The alien then crossed into the United States over the Rio Grande riverbed, was apprehended and was tried, convicted and sentenced for having entered at an undesignated place.[4] The Board sustained the order of deportation but reasoned that the technical charge of entry without inspection should not be considered an abandonment of the alien's lawful permanent residence in the United States. Thus the Board concluded that the alien could adjust his immigration status by leaving under the voluntary departure order and applying for readmission at a regular port of entry (A.17).

Similarly, in Matter of Gutierrez-Lavin,[5] the alien sought reentry after a brief trip to Mexico but had lost his alien registration card. The immigration officer instructed him to return with two photographs and

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3/ INS file # A-10 553 849, decided June 8, 1965 (A.14).

4/ In violation of Section 275 of the Act, 8 U.S.C. § 1325.

5/ INS file # A-8 405 405, decided June 11, 1965 (A.18).

apply for a replacement card. Instead, the alien crossed the border unnoticed. The Board sustained the deportation charge but ordered the matter remanded to permit the alien to secure his alien registration card and thereafter make proper application for admission to the United States as a returning resident (A.20).

The Board's decisions in Romero-Uranga and Gutierrez-Lavin contain no discussion of law on the issue involved here. In fact the terminology used by the Board in both cases almost makes it appear that its holdings were reached as an exercise of discretion. Nevertheless, those holdings must be considered as setting forth a rule of law. This is necessarily so because the issue of whether an alien is or is not a lawful permanent resident is a question of law, not of discretion. There is no statute giving the Attorney General power to grant or revoke lawful permanent resident status simply as a matter of discretion. On the other hand there is a section of law in the Act which defines the status of lawful permanent residence, and that statute governs this case.

The term "lawfully admitted for permanent residence" is defined in Section 101(a)(20) of the Act, 8 U.S.C. § 1101(a)(20), as meaning "the status of having been lawfully accorded the privilege of residing permanently in the United

States as an immigrant in accordance with the immigration laws, such status not having changed " (Emphasis supplied). In this case the Ferraros were of course accorded the privilege of residing here permanently. The issue in the case is whether their status has "changed" within the meaning of 8 U.S.C. § 1101(a)(20). This necessarily is a question of law and requires statutory interpretation.

The exact same issue of law and statutory interpretation was present in Romero-Uranga and Gutierrez-Lavin. Even though the Board did not cite or discuss the statute in either decision, the holdings in each case can only be justified on the basis of the statute. If the Board permitted Romero-Uranga and Gutierrez-Lavin to leave and return and resume their status, it could only have held that their status had not "changed" within the meaning of 8 U.S.C. § 1101(a)(20). Thus the holdings in Romero-Uranga and Gutierrez-Lavin must stand for the proposition that as a matter of law, a permanent resident alien, who becomes deportable because of a technical, non-surreptitious entry without inspection, does not thereby forfeit his lawful permanent resident status within the meaning of 8 U.S.C. § 1101(a)(20), provided he leaves under voluntary departure and returns following proper inspection. If that rule of law governed Romero-Uranga and Gutierrez-

Lavin, then there is no apparent reason why it does not govern this case.

We recognize the possibility that there may have been valid reasons why that rule of law and interpretation of 8 U.S.C. § 1101(a)(20), was not applied in this case. Possibly the Board may have felt that this case was factually distinguishable from its two earlier decisions. Or possibly the Board may have changed its interpretation of 8 U.S.C. § 1101(a)(20), or may be changing it now.[6/] As to this, however, we can only speculate because the Board does not tell us why the rule from its earlier cases is not applicable here.

It has long been a "simple but fundamental rule of administrative law...that the agency must set forth clearly the grounds on which it acted." Atchison, T. & S.F.R.Co. v. Wichita Board of Trade, 412 U.S. 800,807 (1973); S.E.C. v. Chenery, 332 U.S. 194,196 (1943); Papercroft Corp. v. F.T.C., 472 F.2d 927 (7th Cir.1973). This is so even though the agency's decision and the rationale supporting it may be entirely valid. An administrative decision which fails to demonstrate the basis on which the decision was grounded, tends to preclude effective judicial review. Camp v. Pitts, 411 U.S. 138,

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6/ Judge Fieldsteel of course saw the cases as factually similar and was unaware of any Board decision reversing or modifying the rule of law.

142-143(1973). Unless a reviewing court is able to examine the underlying basis for the agency decision it cannot effectively ascertain whether the decision was arbitrary, capricious, or otherwise not in accordance with law.

In this case it is clear that the administrative agency did not set forth the basis or ground upon which it acted. The decision of the Board of Immigration Appeals does nothing more than affirm the finding of deportability and the order of voluntary departure. As we have indicated however, there was another issue in the case aside from deportability, that being the issue of the Ferraros' lawful permanent resident status within the meaning of 8 U.S.C. § 1101(a)(20). There can be no doubt that that issue was properly before the Board. Pursuant to 8 CFR § 3.1(d), the Board is granted the power to exercise "such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case"(Emphasis supplied). Inasmuch as a decision on the issue of the Ferraros' permanent resident status under 8 U.S.C. § 1101 (a)(20) may have completely disposed of the case, it was

incumbent on the Board to make such a decision.[7]

Here, contrary to its mandate under the regulation, the Board did not make any decision on the issue before it. Moreover, even if the Board's perfunctory dismissal of the appeal can be argued to include by implication a decision on the issue against the Ferraros, the Board failed to set forth the basis for that decision. Such a basis must be put forth, particularly where, as here, the Board is confronted with apparent authority the other way. In the absence of such a basis, effective judicial review cannot be obtained.[8]

The conclusion follows that the Board, in failing to determine the issue and in failing to articulate reasons, acted in disregard of its own regulation and violated basic rules of administrative law. On the administrative record as it now stands, this Court to resolve the issue would be required to construe 8 U.S.C. § 1101(a)(20) on a de novo

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7/ "[I]t is a basic concept of the Board's appellate jurisdiction that it must do complete justice for the alien in a given case, and, therefore, must take any action necessary to dispose of the particular case". Matter of S-N-, 6 I&N Dec. 73,75(BIA 1954,AG 1954).

8/ We do not argue that the Board in all cases must set forth discussion of law and the grounds for its decision. In most cases, the Immigration Judge has done that and a simple affirmation by the Board will suffice. But here Judge Fieldsteel didn't find that the Ferraros had lost their permanent resident status. In fact his decision indicated otherwise but left the matter up to the Board.

basis.[9/] This we suggest is properly the Agency's function. The Agency having the expertise is charged in the first instance with construing the statute it administers. Cf. Griggs v. Duke Power Co., 401 U.S. 424,433-34(1971). This Court, rather than determining the issue of law on an initial basis, should properly defer to the Agency. MCI Communications Corp. v. American Telephone & Tel. Co., 496 F.2d 214(3rd Cir. 1974); Hill v. Morton, 525 F.2d 327 (10th Cir. 1975).

9/ The language of 8 U.S.C. § 1101(a)(20) has been construed previously in other settings not necessarily dispositive of the issue here. In Saxbe v. Bustos, 95 S.Ct. 272,277 (1974), the Court in considering the legal status of commuters, found that the change in status contemplated by Congress in 8 U.S.C. § 1101(a)(20) was a change from an immigrant lawfully admitted for permanent residence to the status of a nonimmigrant pursuant to Section 247 of the Act, 8 U.S.C. § 1257. The Board had held the same way in Matter of S-, 6 I&N Dec. 392,396(BIA 1954), when considering the scope of another section of the Act in relation to 8 U.S.C. § 1101(a)(20). In Matter of M-, 5 I&N Dec. 642,647(BIA 1954), the Board held that status had changed upon an entry without inspection but that does not control this case because there the entry was obtained by fraudulent representation of United States citizenship. The same holding was reached on similar facts in Matter of R-, 8 I&N Dec. 598,599(Asst. Comr. 1960). Also status has been held to have changed where an alien leaves the country under an order of exclusion or deportation, Matter of Igal, 10 I&N Dec. 460(BIA 1964); where an alien is involuntarily repatriated to a foreign country in accordance with law, Matter of T-, 6 I&N Dec. 778(BIA 1955); where the alien was removed from the United States at his own request at Government expense, Matter of Morcos, 11 I&N Dec. 740 (BIA 1966); and where status was intentionally relinquished, Matter of Montero, - I&N Dec. -, Int. Dec. 2216(BIA 1973). None of these decisions appear to govern this case and none of them would be in conflict with the rule we suggest emerges from Romero-Uranga and Gutierrez-Lavin, which is of course limited to the non-surreptitious entry without inspection by an otherwise admissible alien, which can be cured simply by leaving and undergoing the required inspection.

CONCLUSION

THE PETITION FOR REVIEW SHOULD BE GRANTED, AND THE MATTER SHOULD BE REMANDED TO THE BOARD OF IMMIGRATION APPEALS WITH INSTRUCTIONS TO DETERMINE WHETHER THE FERRAROS HAVE FORFEITED OR STILL MAINTAIN THEIR LAWFUL PERMANENT RESIDENT STATUS, AND IN THE EVENT OF AN ADVERSE DETERMINATION, TO GIVE REASONS FOR SUCH DETERMINATION.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RAFAEL ALBERTO FERRARO, and MARIA LUISA FERRARO,
Petitoners,

- against -

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 W. 146th St., New York, N.Y.

That on the **30th** *day of* **January** *19* **76** *at* 1 St. Andrews Plaza, **New York, New York**

deponent served the annexed Brief *upon*

U.S. **Attorney** ~~General~~ & **Immigration and Naturalization**

the **Attorney** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this **30th**
day of **January** *19* **76**

Robert T. Brin

James A. Steele
JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977